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Supreme Court of the United States

OCTOBER TERM, 1965.

No. 518

JOHN J. OLING, DAVID J. LANDRY, ON BEHALF OF THEMSELVES AND ALL OTHER "SECOND OFFICERS" IN THE EMPLOY OF UNITED AIR LINES, INC. SIMILARLY SITUATED,
Petitioners,

vs.

AIR LINE PILOTS ASSOCIATION AND UNITED AIR LINES, INC.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT UNITED AIR LINES, INC. IN OPPOSITION.

STUART BERNSTEIN,
ARTHUR J. KOWITT,
Attorneys for Respondent, United Air Lines, Inc.

MAYER, FRIEDLICH, SPIESS, TIERNEY, BROWN & PLATT,
231 South LaSalle Street,
Chicago, Illinois 60604,
Of Counsel.

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TABLE OF CONTENTS.

	PAGE
Opinions Below	1
Question Presented	2
Statement	2
Argument	11
Conclusion	23

INDEX TO CITATIONS.

Cases.

Aircraft & Diesel Equipment Corp. v. Hirsch, 331 U. S. 752 (1947)	20
American Bond & Mortgage Co. v. United States, 52 F. 2d 318 (C. A. 7, 1931), cert. denied, 285 U. S. 538 (1932)	20
Braniff-Mid-Continent Merger Case, 15 CAB 708 (1952)	4
Brotherhood of Locomotive Engineers v. Chicago and North Western Railway Co., 314 F. 2d 424 (C. A. 8, 1963), cert. denied, 375 U. S. 819	12, 21
Callanan Road Improvement Co. v. United States, 345 U. S. 507 (1953)	11
Chorbajian v. CAB, 229 F. 2d 81 (C. A. 2, 1956)	19
City of Tacoma v. Taxpayers of Tacoma et al., 357 U. S. 320 (1958)	11
Cleveland, C. C. & St. L. Ry. Co. v. Jackson, 22 F. 2d 509 (C. A. 6, 1927)	20

D. L. Piazza Co. v. West Coast Line, Inc., 210 F. 2d 947 (C. A. 2, 1954), cert. denied, 348 U. S. 839 20

Delta-C & S Merger Case, 29 CAB 1347 (1959)..12-13, 17-18

FEIA v. NMB, 294 F. 2d 905 (C. A. D. C., 1961), cert. denied, 368 U. S. 956 (1962) 2

Far East Conference v. United States, 342 U. S. 570 (1952) 20

Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc., 371 U. S. 84 (1962) 19

Holman et al. v. Southern Airways, Inc., 210 F. Supp. 407 (N. D. Ga., 1962) 11

Kent v. CAB, 204 F. 2d 263 (C. A. 2, 1953), cert. denied, 346 U. S. 826 .....12, 17, 19, 21

Lambert Run Coal Co. v. Baltimore & Ohio R. R. Co., 258 U. S. 377 (1922) 11

North Atlantic Route Transfer Case, 14 CAB 910 (1951), aff'd. Kent v. CAB, 204 F. 2d 263 (C. A. 2, 1953), cert. denied, 346 U. S. 826 18-19

Northwest Airlines, Inc., et al. v. CAB, et al., 303 F. 2d 395 (C. A. D. C., 1962) 3

Outland v. CAB, 284 F. 2d 224 (C. A. D. C., 1960)..12, 18

Pan American World Airways, Inc. v. United States, 371 U. S. 296 (1963) 22

Pennsylvania R. R. Co. v. United States, 363 U. S. 202 (1960) 20

S. S. W., Inc. v. Air Transport Association of America, 191 F. 2d 658 (C. A. D. C., 1951), cert. denied, 343 U. S. 955 (1952) 19

United-Capital Merger Case, 33 CAB 307 (1961)..3-4, 13

United States v. Lowden et al., 308 U. S. 225 (1939).. 12,

United States v. Philadelphia National Bank, 374 U. S. 321 (1963) 20-21

Western Airlines, Inc. v. CAB, 194 F. 2d 211 (C. A. 9, 1952) 12

Whitney National Bank v. Bank of New Orleans & Trust Co., et al., 379 U. S. 411 (1965) 11, 20

Statutes.

Bank Merger Act of 1960, 12 U. S. C. § 1828(c) 20

Federal Aviation Act, 49 U. S. C. § 1301 et seq. ....

49 U. S. C. § 1378 ..... 9, 12, 21, 22

49 U. S. C. § 1381 22

49 U S. C. § 1384 ..... 21, 22

49 U. S. C. § 1486 ..... 2, 10, 15, 21, 22

49 U. S. C. § 1506 22

Interstate Commerce Act

49 U. S. C. § 5(2) 21

49 U. S. C. § 5(11) 21

49 U. S. C. § 22(1) 21

Railway Labor Act, 45 U. S. C. § 151 et seq. 2, 3

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OPINIONS BELOW.

The opinion of the Court of Appeals for the Seventh Circuit is reported at 346 F. 2d 270 and is printed in Appendix A to the Petition. The District Court did not render an opinion.

QUESTION PRESENTED.

When the Civil Aeronautics Board ("CAB" or "Board"), acting pursuant to its authority under Section 408 of the Federal Aviation Act (49 U. S. C. § 1378), issues an order approving a merger between two air carriers which order contains provisions for the protection of affected employees, including a requirement that seniority lists of the merged carriers be integrated in a "fair and equitable" manner, and a group of employees later invokes the Board's jurisdiction to challenge the fairness of the list formulated by their collective bargaining representative and the surviving carrier, pursuing their remedy before the CAB to the point of adverse decision, may those same employees maintain an action in the federal district courts under the Railway Labor Act (45 U. S. C. § 151 *et seq.*) raising the same issues and seeking basically the same relief as before the Board or are they relegated to their statutory right of review under Section 1006 (49 U. S. C. § 1486) of the Federal Aviation Act?

STATEMENT.

The facts which led to this litigation arose out of two independent, though closely related, events which occurred almost simultaneously during the spring of 1961. One was the certification by the National Mediation Board ("NMB") on May 31, 1961 of the Air Line Pilots Association ("ALPA") as the exclusive bargaining agent of United's entire flight deck crew following an NMB determination on January 17, 1961[1] that all members of United's

1. This craft or class determination was upheld by the Court of Appeals for the District of Columbia in *FEIA* v. *NMB*, 294 F. 2d 905 (C. A. D. C., 1961), *cert. denied* 368 U. S. 956 (1962), after attack by petitioners here.

flight deck crew, including its pilots, co-pilots and flight engineers, constituted a single craft or class for purposes of collective bargaining under the Railway Labor Act (45 U. S. C. § 151, *et seq.*) (P. A. 19-20).[2] The other was the merger of Capital Airlines into United. The merger agreement was entered into between the two airlines on August 11, 1960, was approved by the CAB on April 3, 1961, and became effective on June 1, 1961, at which time the employees of Capital became the employees of United (P. A. 17-18, 19).[3]

Prior to the certification of ALPA in May 1961 as the representative of United's entire flight deck crew, the flight engineers at United, i.e., those occupying the third seat in the cockpit, had been separately represented for purposes of collective bargaining by the UNA Chapter, Flight Engineers International Association, AFL-CIO ("FEIA") (P. A. 19). Petitioners herein (plaintiffs below) purportedly represent a group of about 233 flight engineers at United commonly known as "career flight engineers", who were affiliated with the FEIA and who, for many years, had opposed affiliation with ALPA together with all efforts to combine the flight deck crew into a single craft or class (P. A. 3, 73). Petitioners refused to become members of ALPA even after the latter's certification in May of 1961 (P. A. 3, 5, 73).

Before the NMB rendered its decision blending United's entire flight deck crew into a single craft or class, petitioners requested that the CAB condition approval of the merger upon appropriate guarantees by United ". . . that the contractual rights of the United flight engineers to pilot

2. References herein to the Appendix filed by petitioners with the court below will be preceded by the abbreviation "P. A.".

3. The CAB order approving the merger was affirmed in *Northwest Airlines, Inc. et al.* v. *CAB, et al.*, 303 F. 2d 395 (C. A. D. C., 1962) (P. A. 17-18).

jobs . . . [be] fully protected." *United-Capital Merger* Case, 33 CAB 307, 391 (1961) (P. A. 123-24). But the Board refused to impose such guarantees, ordering instead that United comply with a set of labor protective provisions of the type ordinarily imposed by the CAB upon a surviving carrier to protect the employees against possible adverse effects of the merger (P. A. 18). In regard to seniority integration, Section 3 of the Board's labor protective provisions stated (P. A. 18, 35-6):

> "Insofar as the merger affects the seniority rights of the carriers' employees, provisions shall be made for the integration of seniority lists in a fair and equitable manner, including, where applicable, agreement through collective bargaining between the carriers and the representatives of the employees affected. In the event of failure to agree, the dispute may be submitted by either party for adjustment in accordance with Section 13."

Moreover, the Board granted petitioners' request to reserve jurisdiction over seniority integration (33 C.A.B. at 391) in order to make any needed changes, providing in its order (P. A. 19, 34):

> ". . . [t]hat jurisdiction is hereby reserved [by the CAB] to make such amendments, modifications, and additions to the labor protective conditions imposed by paragraph 2(c) above as circumstances may require."

Following approval of the merger, ALPA began to implement its own established procedures for formulating an integrated seniority list for all flight deck personnel on the merged carrier (P. A. 20). These are the same procedures which the CAB had previously approved in other merger proceedings. See *Braniff-Mid-Continent Merger Case,* 15 CAB 708, 711 (1952). Pursuant to these procedures, representatives were chosen from among the employees represented by ALPA at each of the affected

airlines for the purpose of compiling a single seniority list. However, the merger representatives so chosen were unable to resolve their differences concerning seniority integration through negotiation, and the matters in question were submitted to arbitration in accordance with the procedures prescribed in ALPA's Policy Manual (P. A. 20).

Two arbitration proceedings were held, the first before an arbitration board headed by Arbitrator Harry Abrahams ("the Abrahams arbitration"), and the second before an arbitration board headed by Arbitrator David L. Cole ("the Cole arbitration"). United was not a party to either of these proceedings (P. A. 20-21).

The Abrahams arbitration award, dated March 28, 1962, established a single seniority list for United's pilots and co-pilots and Capital's pilots, co-pilots and flight engineers, respecting their bidding rights to the first and second seats on United aircraft subsequent to the merger (P. A. 21, 46-64). The matter of integrating United's flight engineers into the seniority list compiled by the Abrahams board was left for determination by the Cole arbitration board, ALPA not having been certified as the representative of United's flight engineers until after the seniority integration procedures had already commenced (P. A. 21).

The Abrahams board credited Capital's pilots, co-pilots and flight engineers with all time spent by them in the third seat of the cockpit as flight engineers for purposes of pilot seniority, in recognition of the fact that at Capital all members of the flight deck crew including its flight engineers had traditionally appeared on a single pilots' seniority list, having been hired as pilots and having been required to qualify as such (P. A. 61, 72, 76).[4] By con-

4. This was largely attributable to the fact that Capital had relatively few aircraft (about 40) requiring three-man crews (P. A. 72).

trast, United maintained two separate seniority lists under different labor agreements—one for pilots and the other for flight engineers (P. A. 51-52). From 1949 to 1954 United's flight engineers unlike those at Capital, were not required to qualify as pilots (P. A. 74-75). However, in 1954 United began to require pilot qualification for all of its flight engineers (P. A. 75). Although United continued to maintain separate seniority lists for its flight engineers and pilots, it also began in 1955 to maintain a "call-up list" containing the names of all flight engineers who desired advancement to pilot and co-pilot positions (P. A. 52, 75). From that time on, a flight engineer was placed on the call-up list upon becoming pilot qualified unless he specifically objected to such inclusion (P. A. 75). All but 29 of United's pre-1954 flight engineers objected to being placed on that list (P. A. 75). Petitioners in this proceeding were among those who objected, the reason being that they preferred the status of "career flight engineers" (P. A. 6, 127-28). This was in marked contrast to the preference expressed by "pilot engineers" on the call-up list who desired advancement to piloting positions.[5] The Abrahams board credited United's pilots and co-pilots with all time spent by them as flight engineers toward piloting positions "*during the periods when it was the policy of United to hire only Pilot-qualified Second Officers . . .*" (P. A. 61) (emphasis added).

The award of the Cole arbitration board, which resolved the seniority status of United's flight engineers respecting their bidding rights to pilot and co-pilot seats on United aircraft, was issued on August 24, 1962 (P. A. 21, 65-83). The award stated (P. A. 73):

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5. The call-up list was specifically recognized in the 1958 FEIA-United agreement which provided that flight engineers on that list who bid into pilot and co-pilot positions would continue to accrue seniority on the flight engineers list for a specified period of time (P. A. 75-76).

> "There are really three points of view presented at our hearings—[1] those of the Capital group, [2] the United pilots and second officers, and [3] *that of a group of older flight engineers who have opposed affiliation with ALPA over the years [and who have opposed] . . . all moves designed to blend the flight engineer and pilot functions into one category.* These are referred to as the *career flight engineers,* some 244 in number." (Emphasis added.)

The career flight engineers (petitioners herein) presented their views to the Cole board through their representatives who made opening and closing arguments and submitted written statements as evidence (P. A. 22, 73).[6] In essence, their position was that they were entitled to full seniority credit *as pilots* for time spent as flight engineers when they had no seniority rights to piloting positions (P. A. 22-3, 73-4). They also argued that "there is a legal duty on ALPA to represent all employees in the expanded bargaining unit, and that if their total length of service is not credited to them in placing them on the pilot seniority list ALPA will be guilty of discrimination against them" (P. A. 74).

The Cole board rejected the contentions of the career flight engineers as being "extreme" pointing out that acceptance of petitioners' views "would reverse a great deal of history and call for a retroactive readjustment of United's pilot seniority list back to 1947" (P. A. 23-4, 78-9). The Cole board noted that the objection to the inclusion of petitioners on United's call-up list came from the career flight engineers themselves (P. A. 78). And the board saw nothing discriminatory in placing the pilot engineers on the call-up list ahead of the career flight engineers for purposes of pilot seniority. The board stated (P. A. 78):

6. Petitioners were represented before the Cole board by the same counsel who represent them here. In addition, a number of petitioners appeared before that board in an individual capacity (P. A. 65).

"The issues presented by these differences, and by the position of the professional flight engineer group, are confused by variables and by facts of history. Capital's practice, as indicated, has been different from United's. The call up list is an unusual type of list. Strictly speaking, it is not part of the pilot seniority list of United, yet it confers bidding rights to copilot vacancies. Oddly, it is not covered by the pilot agreement, but rather by the flight engineer agreement. Still, the two pilot groups, and the company as well apparently, feel that it does partake sufficiently of the nature of a pilot seniority list to entitle individuals on it to be integrated into the combined pilot seniority list. I agree that this is so."

Thus, the integrated seniority list formulated by the two arbitration boards, while preserving petitioners' superior right to third seat assignments, denied to them the same seniority status to first and second seat assignments that had been accorded to the pilot engineers who, unlike petitioners, had made themselves available for ultimate progression to piloting positions. The Cole board expressly noted that even though United was not a party to these arbitrations, it was reasonable to assume that United would give "serious and probably sympathetic consideration to these awards, unless they are patently unreasonable or unrealistic." (P. A. 66-67.)

On August 29, 1962, ALPA advised United by letter of its intention to negotiate the Abrahams and Cole awards into a collective bargaining agreement with United (P. A. 24, 85-6). United thereafter met with representatives of ALPA for this purpose (P. A. 26). Nearly a full year of negotiations passed before United finally concluded an agreement with ALPA on June 11, 1963, embodying the terms of the two awards (P. A. 26, 90-98).

On November 27, 1963, plaintiffs petitioned the CAB to set aside the seniority integration list agreed to by United

and ALPA (P. A. 26-27, 99-106), invoking the Board's jurisdiction under Section 408 of the Federal Aviation Act, Section 4 of the Board's merger approval order, and Section 3 of the labor protective provisions appended to that order.

Petitioners charged that "United has failed to integrate the seniority of its employees and the former Capital employees in a fair and equitable manner. . . ." (P. A. 105, ¶ 20); that "United has invidiously discriminated against petitioners as a class. . . ." (P. A. 105, ¶ 21); that "ALPA has willfully failed to perform its statutory duty as a collective bargaining agent of representing petitioners . . . fairly and without prejudice" (P. A. 105, ¶ 22); and that "United and ALPA have acted in bad faith and in a deliberate effort to subvert an order of the Civil Aeronautics Board which requires integration of seniority in a fair and equitable manner. . . ." (P. A. 105, ¶ 23.) They prayed that the CAB open the *United-Capital Merger Case* for the purpose of holding a hearing respecting their claim that United and ALPA had failed to integrate seniority in a "fair and equitable manner"; vacate the integrated seniority list agreed to between United and ALPA on June 11, 1963; order United and ALPA to refrain from giving effect to that list; require that petitioners be given the same seniority credit for pilot and co-pilot seats as all other members of the flight deck crew; and grant "such other and further relief as the Board deems appropriate in the premises" (P. A. 105-106).

The CAB, after giving ". . . careful consideration to the contentions of the parties and to the documentary evidence . . . including the text of the Abrahams and Cole Arbitration Awards" (P. A. 111), entered an order dated April 24, 1964 dismissing complainants' petition (P. A. 28, 106-15). The order stated (P. A. 111) that "We find no sup-

port in the pleadings before us for the relief petitioners request. . . ."

The CAB found that the seniority list agreed to by United and ALPA was accomplished in a "fair and equitable manner" (P. A. 114). It specifically rejected petitioners' contentions that United attempted to "subvert" the Board's merger order (P. A. 113); that United "invidiously discriminated against petitioners as a class" (P. A. 113); and that ALPA "willfully failed to perform its statutory duty as collective bargaining agent" (P. A. 113-14).

Thereupon, petitioners, without appealing from the CAB's order under Section 1006 of the Federal Aviation Act (49 U. S. C. § 1486), instituted the present action in the District Court below on September 4, 1964. On September 29, 1964, United filed a motion, supported by affidavit and brief, to dismiss the complaint "for lack of jurisdiction and for failure of plaintiffs to state a claim upon which relief could be granted." Plaintiffs filed a brief and affidavits in opposition (P. A. 2).

On November 16, 1964, the District Court entered an order granting defendants' motion to dismiss the complaint. That decision was affirmed by the Court of Appeals for the Seventh Circuit on June 4, 1965 (Pet. Appendix A; 346 F. 2d 270).

ARGUMENT.

The holding of the court below does not, as petitioners contend (Pet. 11)[7], establish a "new rule, requiring election between administrative and judicial remedies." Rather, that holding represents no more than a routine application of the well settled principle that when an administrative agency renders a decision which is within its statutory powers and Congress has prescribed a specific method for obtaining review of such a decision, that method of review is exclusive and the administrative decision may not, therefore, be attacked collaterally in the federal district courts (Pet. 9a-11a; 346 F. 2d at 275-76). See *Whitney National Bank* v. *Bank of New Orleans & Trust Co., et al.*, 379 U. S. 411, 420 (1965); *Holman, et al.* v. *Southern Airways, Inc.*, 210 F. Supp. 407 (N. D. Ga., 1962); *City of Tacoma* v. *Taxpayers of Tacoma, et al.*, 357 U. S. 320, 334-37 (1958); *Callanan Road Improvement Co.* v. *United States*, 345 U. S. 507, 512-13 (1953); *Lambert Run Coal Co.* v. *Baltimore & Ohio R. R. Co.*, 258 U. S. 377, 381-82 (1922).[8]

Dismissal of the complaint below was affirmed not merely because petitioners "invoked" the jurisdiction of the CAB, but because petitioners pursued their remedy before the CAB "to the point of an adverse decision" and because they "sought a review" of that decision in the federal district courts instead of following the statutory method of review prescribed by Congress (Pet. 14a; 346 F. 2d at 278).

7. Petitioners' Writ of Certiorari will hereinafter be referred to as "Pet."

8. The pertinent cases supporting this principle (most notably the *Whitney* and *Holman* cases cited above) were considered at length by the court below and need not, therefore, be treated in detail here (Pet. 9a-11a; 346 F. 2d at 276-77).

The court below never reached the question whether the District Court would similarly have lacked jurisdiction over the subject matter had petitioners initially attempted to invoke the jurisdiction of the court rather than that of the CAB (Pet. 14a; 346 F. 2d at 278).

The power of the CAB to resolve controversies over seniority integration arising out of mergers subject to its jurisdiction can hardly be questioned. Section 408 of the Federal Aviation Act (49 U. S. C. §1378) provides that the CAB shall approve mergers "upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe . . . [u]nless . . . the Board finds that the . . . merger . . . will not be consistent with the public interest. . . ." And the applicable precedents uniformly hold that Section 408 gives the CAB complete authority with respect to protection of employees affected by the merger, including problems of seniority integration. See *United States, et al.* v. *Lowden, et al.*, 308 U. S. 225, 238 (1939); *Western Airlines, Inc.* v. *CAB*, 194 F. 2d 211, 213-14 (C. A. 9, 1952); *Kent* v. *CAB*, 204 F. 2d 263, 265 (C. A. 2, 1953), *cert. denied* 346 U. S. 826; *Outland, et al.* v. *CAB*, 284 F. 2d 224, 228 (C. A. D. C. 1960); *Brotherhood of Locomotive Engineers* v. *Chicago & North Western Railway Co.*, 314 F. 2d 424, 429 (C. A. 8, 1963), *cert. denied* 375 U. S. 819.

In exercising its power under Section 408, the CAB prefers, of course, to allow the parties themselves (i.e., the unions and the carriers) to formulate their own integrated seniority list through negotiation, agreement and arbitration under general standards or guidelines prescribed by the Board. But in such cases, the Board remains available at all times to hear and determine complaints by interested parties respecting compliance with those standards. See *Delta-C&S Merger Case*, 29 CAB

1347, 1350 (1959). Thus, the United-Capital merger order contained the usual labor protective conditions prescribed by the CAB, including the requirement that seniority integration be worked out between the parties "in a fair and equitable manner" (P. A. 35) with the added proviso that "jurisdiction is hereby reserved to make such amendments, modifications, and additions to the labor protective conditions . . . as circumstances may require" (P. A. 34).[9]

It was shortly after ALPA's certification in May, 1961 as representative of United's entire flight deck crew that petitioners wrote to the CAB notifying it of their disagreement with ALPA over seniority integration and reminding the Board that it had "retained final jurisdiction of the seniority settlement" arising out of the merger (P. A. 161-62) (emphasis added). Petitioners urged that "the CAB fully investigate the seniority problem and allow the . . . FEIA to intervene in behalf of those formerly represented by it under the Flight Engineer Craft" (P. A. 161-62). Then, on January 29, 1962, petitioners wrote to Mr. Sayen, the president of ALPA, advising him that "the C.A.B. has retained jurisdiction to see to it . . . [that] seniority lists be integrated in a 'fair and equitable manner,'" adding that this could not be done unless the career flight engineers were given full seniority credit toward pilot seats for all time spent by them in the third seat of the cockpit (P. A. 175-76).

Finally, after once again apprising the Board of the "need to continue [its] . . . reservation of jurisdiction until

9. During the course of the merger proceedings themselves, petitioners specifically requested that the Board retain jurisdiction "until the seniority and employee integration issues have been settled." That request was made after an unsuccessful effort by petitioners to have the Board condition the merger upon appropriate guarantees by United ". . . that the contractual rights of the United flight engineers to pilot jobs . . . [be] fully protected." *United-Capital Merger Case*, 33 CAB 307, 391 (1961).

this matter has been resolved" (P. A. 118-19), petitioners invoked the Board's reserved jurisdiction in a petition filed on November 27, 1963 (P. A. 99, *et seq.*). The petition reiterated the same charges and recited the same facts that had previously been presented by them to arbitrator Cole in support of their position that anything less than full credit for the third seat service toward piloting positions would be discriminatory and in violation of ALPA's "legal duty . . . to represent all employees in the expanded bargaining unit. . . ." (See Cole award at P. A. 74). These were the same facts, moreover—cast in virtually the same language—that later appeared in the complaint filed by petitioners in the court below, the only difference being that in the complaint the allegations were labeled as violations of the Railway Labor Act.

The CAB accepted petitioners' factual allegations as true for purposes of its ruling (P. A. 113-14). And in its order of April 24, 1964 (P. A. 106, *et seq.*), the Board rejected petitioners' claim that United and ALPA failed to integrate seniority "in a fair and equitable manner" (P. A. 114). It stressed the facts that the Cole board "gave consideration" to that very argument and that petitioners themselves elected "to refrain from being a full party" to that proceeding, pointing out that they did, nevertheless, avail themselves of their right to present their views to the Board (P. A. 114). The Board went on to hold that "the factual allegations by the petitioners [were] . . . completely lacking in any support for the conclusion that United engaged in an effort to 'subvert' the merger order" (P. A. 113). Similarly, it found no basis for the charges that "United . . . invidiously discriminated against petitioners as a class . . ." (P. A. 105, 113) or that "ALPA . . . failed to perform its *statutory duty* as a collective bargaining agent of representing peti-

tioners . . . fairly and without prejudice" (P. A. 105, 114) (emphasis added). Rejecting these contentions *on their merits,* the Board observed that United, as an air carrier, was under a statutory duty "to treat with [ALPA], the designated employee representative" (P. A. 113).

In their affidavits petitioners state (P. A. 202) that the CAB erroneously "pass[ed] *final judgment* on our claims of unfair treatment . . ." without according to them a full and fair hearing, adding that the Board's rejection of their claim of discriminatory treatment had "no basis in fact" (P. A. 201) (emphasis added). They attribute "the errors made by the Board" to its "indiscriminate reliance upon Mr. Cole . . ." (P. A. 201). But despite petitioners' belief that such "errors" had been committed by the CAB, they chose not to seek review of the Board's order under Section 1006 of the Federal Aviation Act, this despite the fact that Section 1006 gives the United States Courts of Appeal on *direct review* "exclusive jurisdiction to affirm, modify or set aside" orders of the CAB. Curiously enough, petitioners' only explanation for this failure is that "there was nothing to appeal from"! (Pet. 15.)

Instead, petitioners allowed the time for *direct appeal* to expire and then filed the present action in a District Court seeking relief under the Railway Labor Act. Petitioners concede that the issues here are "in some respects" identical to those before the CAB (Pet. 2), but go on to argue that the complaint filed in the District Court was addressed "to the larger problem of obtaining future protection against the general discriminatory conduct by ALPA and United—going far beyond the matter of seniority as such. . . ." (Pet. 8). An analysis of the complaint, however, fails to bear out even this partial answer to the decision of the court below. Petitioners say (Pet. 8-9) that there are three categories of issues

covered by the instant complaint, namely, (1) ALPA's violation of its duty to represent plaintiffs fairly and without discrimination under the Railway Labor Act and United's knowing participation in agreements which were the products of such discrimination; (2) unlawful encouragement by respondents of membership in ALPA and interference with plaintiffs' rights under the Railway Labor Act; and (3) the unlawful delegation by United to ALPA of complete control over seniority integration.

But even accepting petitioners' own analysis of the issues presented by the complaint, it is apparent that they are the same issues that were presented to, and rejected by, the CAB. All three categories of issues and all of the facts alleged in the complaint are related to the single notion that the integrated seniority list arrived at by respondents is discriminatory in that it fails to accord to petitioners the seniority credit to which they deem themselves entitled. Their single-mindedness on this score is shown by their insistence that any plan of seniority integration other than the one they themselves proposed must *ipso facto* be discriminatory, and therefore, "unfair" or "inequitable" (P. A. 4-5, 84, 138, 176-77, 198, 201, 203). Moreover, despite the reasonable explanations offered by both the CAB and the Cole board for sustaining the integrated seniority list arrived at by the parties, petitioners insist that the seniority arrangements approved by the Board *could only be* the product of unlawful discrimination —a view which, as we have seen, was rejected by both the CAB and the Cole board.

Nor is there any merit to petitioners' suggestion (Pet. 14-15, 18) that the CAB's inquiry into compliance with its "fair and equitable" standard came to an end when ALPA and United agreed upon an integrated seniority list. Although it is true, as the Board here stated (P. A. 111-12), under ordinary circumstances it prefers that the parties

themselves formulate their own seniority list through negotiation, agreement and arbitration, this in no way alters the fact that the Board retains full and complete authority to set aside such agreements and to prescribe its own seniority list when warranted by the circumstances. Thus, in *Kent* v. *CAB*, 204 F. 2d 263 (C. A. 2, 1953), *cert. denied* 346 U. S. 826, the Court sustained the Board's action in imposing its own list upon the parties, stating at pages 265-66 as follows:

> "And when such a dispute develops, it is within the power of the Board to order the carrier to follow whatever course is necessary and appropriate. An overall supervision of the merging carrier so as to protect adequately the public interest is what Sec. 408(b) of the Act contemplates, and that is what these orders accomplish. The same power to order the initial integration justifies the Board's further requirement that the employer refrain from making any labor contract in the future which will not conform to it."

The fact that here the CAB denied petitioners' request to "set aside and vacate the integrated seniority list agreed to between United and ALPA June 11, 1963" (P. A. 105), only serves to underscore the Board's power in this regard and to confirm the fact that the present action is truly one for "review" of a CAB order.[10] This was

10. This is precisely what distinguishes our case from *Delta-C&S*, 29 CAB 1347 (1959), upon which petitioners rely (Pet. 12). Petitioners incorrectly state that the Board there similarly rejected complainants' challenges to the interpreted seniority list on their "merits" (Pet. 12). The fact is, that the Board in that case never reached the merits of those claims because complainants failed to allege (a) that ALPA did not perform "its statutory function of representing the pilots . . ." and (b) that "Delta or ALPA acted in bad faith or with deliberate intent to subvert the Board's order" (29 CAB at 1350). Both of these allegations were made and passed upon by the Board here (P. A. 105, 113). In any event, even under the circumstances present in *Delta-C&S* the complainants pursued their statutory remedy of review under Sec-

the same relief, incidentally, which petitioners requested of the District Court below (P. A. 10). Indeed, of the eight requests for relief appearing in the complaint (P. A. 9-10), six were expressly concerned with the integrated seniority list agreed upon by ALPA and United. And the two remaining requests (i.e. Nos. 1 and 4), though not expressly directed to that agreement, were necessarily related to it by implication since they were based upon precisely the same facts as the others. It should not be surprising, therefore, that the court below concluded:

> "* * * True, there are some allegations in the complaint not made in plaintiffs' petition before the Board, but in essence they are the same, although in some instances couched in different phraseology. (Pet. 12a; 346 F. 2d at 277.)
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> "It can hardly be doubted but that the heart of plaintiffs' contention before the Board, as well as in its complaint, is their request for relief from what they claim was their unfair listing relative to seniority rights. Other allegations in their complaint are merely subsidiary to and offered in support of that principal claim." (Pet. 14a; 346 F. 2d at 278.)

Petitioners' reliance upon the CAB's alleged lack of power over unions (Pet. 7, 9) is equally unavailing. In this connection it may be noted that in the *North Atlantic Route Transfer Case*, 14 CAB 910 (1951), *aff'd. Kent* v. *CAB*, 204 F. 2d 263, 265-66 (C. A. 2, 1953), *cert. denied* 346 U. S. 826, the CAB found it unnecessary to decide whether the Trial Examiner properly exercised jurisdiction to order the labor groups to cooperate with Pan American in carrying out a Board approved seniority integration plan, stating as follows (14 CAB at 925):

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tion 1006 of the FAA instead of seeking "review" in the federal district courts as petitioners did here. See *Outland* v. *CAB*, 284 F. 2d 224 (C. A. D. C. 1960).

> "It is objected that the Board does not have such power. We do not deem it necessary to pass upon this point. Our authority to bring the problem before us to an equitable solution is complete through our power to direct Pan American to take appropriate action. . . ."

In that case, the Board specifically included in its order a provision forbidding the carrier from entering into any agreement with the union which would have the effect of discriminating against the interests of a minority in the bargaining unit (14 CAB at 925). In affirming that order, the Court of Appeals stated (204 F. 2d 266):

> "The same power to order the initial integration justifies the Board's further requirement that the employer refrain from making any labor contract in the future which will not conform to it."[11]

Nor does the doctrine of exhaustion of administrative remedies excuse petitioners' failure to seek review under Section 1006 of the Federal Aviation Act. It is well settled that that doctrine requires resort not merely to the administrative agency alone, but resort as well to the judicial appeals provided by the statute from which the agency's

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11. Petitioners themselves recognized the CAB's collateral power over unions since in their petition before the CAB they specifically requested that the Board "order . . . ALPA to cease and desist giving effect in any manner whatsoever to said integrated list . . ." (P. A. 105).

As for petitioners' claim (Pet. 7) that the Board also lacked the power to award *damages* for violation of its "fair and equitable" standard, it is significant that in *Chorbajian* v. *CAB*, 229 F. 2d 81, 83 (C. A. 2, 1956), the Court recognized that the Board had the power either to award or withhold damages for such violations. In any event, the governing rule is that a suit for damages may only be entertained by the courts *after* the Board has already found that a violation of the statute has been committed. Compare *Hewitt-Robins, Inc.* v. *Eastern Freight-Ways, Inc.*, 371 U. S. 84, 88 (1962) (Pet. 19), with *S. S. W., Inc.* v. *Air Transport Assn. of America*, 191 F. 2d 658, 662-64 (C. A. D. C. 1951), *cert. denied* 343 U. S. 955 (1952). In other words, the judicial remedy must be consistent with the substantive determination of the administrative agency, not opposed to it, as petitioners urge here.

jurisdiction is derived.[12] Only recently this Court stated in *Whitney National Bank* v. *Bank of New Orleans & Trust Co., et al.*, 379 U. S. 411, 422 (1965):

> "Moreover, it [Congress] has enacted a specific statutory scheme for obtaining review, and *where Congress has directed such a procedure as that found in the Bank Holding Company Act of 1956, the doctrine of exhaustion of administrative remedies comes into play and requires that the statutory mode of review be adhered to notwithstanding the absence of an express statutory command of exclusiveness.*" (Emphasis added.)

A fortiori, this is so where, as in our case, there is an "express statutory command of exclusiveness."

The *Philadelphia Bank Case* (374 U. S. 321 (1963)), cited by petitioners (Pet. 12, 16-17), is clearly inapposite. There, the Court held that a district court may enjoin a bank merger under the antitrust laws despite earlier approval of the merger by the Comptroller of Currency under the Bank Merger Act of 1960 (12 U. S. C. § 1828 (c)). In so holding, the Court grounded its decision upon the facts: (a) that the acts charged as violations of the antitrust laws were not "precise ingredients" of the Comptroller's "regulatory and remedial powers" under the Bank Merger Act (374 U. S. at 351); (b) that there was ". . . no specific provision for judicial review of . . . [the Comptroller's] decision" (374 U. S. at 351, 354); (c) that the legislative history of the Bank Merger Act shows that it ". . . would not affect in any way the applicability of the antitrust laws

12. See *Pennsylvania R. R. Co.* v. *United States*, 363 U. S. 202, 205-06 (1960); *Far East Conference* v. *United States*, 342 U. S. 570, 577 (1952); *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U. S. 752, 767 (1947); *D. L. Piazza Co.* v. *West Coast Line, Inc.*, 210 F. 2d 947, 949 (C. A. 2, 1954), *cert. denied* 348 U. S. 839; *American Bond & Mortgage Co.* v. *United States*, 52 F. 2d 318, 320 (C. A. 7, 1931), *cert. denied* 285 U. S. 538 (1932); *Cleveland, C. C. & St. L. Ry. Co.* v. *Jackson*, 22 F. 2d 509, 511 (C. A. 6, 1927).

to bank acquisitions" (374 U. S. at 352); and (d) that ". . . bank regulation is in most respects less complete than public utility regulation, to which interstate rail and *air carriers* . . . are subject" (374 U. S. at 352) (emphasis added).

None of the above factors is present here. The facts alleged by petitioners in their complaint were not merely "precise ingredients" of the CAB's merger approval authority under Section 408 of the Act; they were "facts" which the CAB actually took into account in rejecting the challenges asserted by petitioners. Final orders of the CAB *are* subject to judicial review under Section 1006 of the Act and the legislative history of that Act reveals no intention to leave the Railway Labor Act unaffected by orders of the CAB under Section 408. On the contrary, Section 414 of the Act (49 U. S. C. § 1384) forecloses operation of the Railway Labor Act to the extent that it may conflict with orders of the CAB under Section 408.[13]

13. Section 414 of the Federal Aviation Act (49 U. S. C. § 1384) provides:

> "Any person affected by any order made under [§§ 408, 409 or 412] shall be, and is hereby, relieved from the operations of the 'antitrust laws,' . . . *and of all other restraints or prohibitions made by, or imposed under, authority of law,* insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order." (Emphasis added.)

Significantly, in *Brotherhood of Locomotive Engineers* v. *Chicago & North Western Ry. Co.*, 314 F. 424 (C. A. 8, 1963), cert. denied 375 U. S. 819, the Court, construing language almost identical to Section 414 of the Federal Aviation Act (49 U. S. C. § 5(11)), held that the ICC acting pursuant to its merger approval authority under Section 5(2) of the Interstate Commerce Act had the power to prescribe whatever seniority integration procedures it deemed appropriate even though the procedures it adopted were in conflict with those prescribed by the Railway Labor Act (314 F. 2d at 431-32). In fact, the Court bolstered its decision by relying upon the plenary authority of the CAB over seniority integration as announced in *Kent* v. *CAB*, 204 F. 2d 263 (C. A. 2, 1953) (314 F. 2d at 429-30). The fact that the Interstate Commerce Act (49 U. S. C. § 22(1)) contained a savings clause similar in scope to

Indeed, it is clear from *Pan American World Airways, Inc.* v. *United States,* 371 U. S. 296 (1963), that where the acts charged as violations of the antitrust law *are* "precise ingredients" of the statutory powers exercised by the CAB under the Federal Aviation Act, the federal district courts are without jurisdiction to entertain the action in the first place since exclusive jurisdiction over such matters had been entrusted by Congress to the CAB. That conclusion applies with even greater force here because the CAB's authority under Section 408 of the Act is immunized from other laws (including the Railway Labor Act) by virtue of Section 414, whereas in *Pan American,* the Board's action was taken pursuant to Section 411 of the Act (49 U. S. C. § 1381) which is not within the ambit of Section 414.

Be that as it may, the court below found it unnecessary to decide whether the District Court would have had jurisdiction under the Railway Labor Act if petitioners had gone there initially. The fact is that petitioners did not, but proceeded instead before the CAB, pursuing that remedy to the point of adverse decision. Under these circumstances, there can be no question but that petitioners' exclusive right of review was before the Court of Appeals under Section 1006 of the Act and having failed to pursue that remedy, their action in the District Court was properly disallowed.

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the one appearing in Section 1106 of the Federal Aviation Act (49 U. S. C. § 1506) (upon which petitioners rely) (Pet. 18) did not require a different result.

CONCLUSION.

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

STUART BERNSTEIN,
ARTHUR J. KOWITT,
231 South LaSalle Street,
Chicago, Illinois,
Counsel for Respondent,
United Air Lines, Inc.

MAYER, FRIEDLICH, SPIESS,
TIERNEY, BROWN & PLATT,
231 South LaSalle Street,
Chicago, Illinois 60604,
Of Counsel.

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